(2)

NO. 94-1964

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

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JOHN W. SHOEMAKER, ET AL.,
Petitioners,

v.

GLENN S. KELLOGG; LANI R. SMITH; JOHN STAMPER;
LAWRENCE DESSENBERG; ROBERT DONLEY; MICHAEL JONES;
MICHAEL KARHOFF; DANIEL SCHREIBER,
on behalf of themselves
and all others similarly situated,
Respondents.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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# RESPONDENTS' BRIEF IN OPPOSITION

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DAVID H. BODIKER #0016590
State Public Defender

THOMAS R. WETTERER, JR. #0020980
Assistant State Public Defender
Counsel of Record

KENNETH R. SPIERT # 0038804
Assistant State Public Defender

Ohio Public Defender Commission
8 East Long Street - 11th floor
Columbus, Ohio 43215
(614) 466-5394

COUNSEL FOR RESPONDENTS

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# RESPONDENTS' BRIEF IN OPPOSITION

---

[1] Pursuant to Rule 14.1(b), the Petitioners are: John W. Shoemaker, Chief, Ohio Adult Parole Authority; Raymond E. Capots, Chairman, Ohio Parole Board; George A. Bustamante, Member, Ohio Parole Board; Owen J. Barnes, Member, Ohio Parole Board; Margarette T. Ghee, Member, Ohio Parole Board; Frederick E. Rambacher, Member, Ohio Parole Board; William E. Hudson, Member, Ohio Parole Board; Robert E. Smith, Member, Ohio Parole Board; H. Richard Gooch, Member, Ohio Parole Board; and, Gloria R. Andrews, Member, Ohio Parole Board. The Ohio Attorney General represents all the petitioners.

## PETITIONERS' QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COURT BELOW SHOULD RECONSIDER ITS *EX POST FACTO* RULING DECIDED PRIOR TO THIS COURT'S DECISION IN *CALIFORNIA DEPARTMENT OF CORRECTIONS V. MORALES*, ___ U.S. ___, 115 S.CT. 1597 (1995).

2. WHETHER THE *EX POST FACTO* CLAUSE, AS INTERPRETED IN *CALIFORNIA DEPARTMENT OF CORRECTIONS V. MORALES*, ___ U.S. ___, 115 S.CT. 1597 (1995), PERMITS STATES TO AMEND REGULATIONS GOVERNING THE PROCEDURES UNDER WHICH PAROLE MAY BE REVOKED AND APPLY THOSE AMENDMENTS TO PREVIOUSLY SENTENCED INMATES WHO HAVE COMMITTED A NEW CRIME WHILE ON PAROLE.

## OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals is reported at *Kellogg v. Shoemaker*, 46 F.3d 503 (6th Cir. 1995), and is reproduced in the Appendix to this brief in opposition at A-1. The February 28, 1995 order of the Sixth Circuit Court of Appeals denying the parties' petitions for rehearing is unreported, but is reproduced in the Appendix at A-6.

The May 27, 1993 Opinion and Order of the United States District Court for the Southern District of Ohio, Eastern Division, granting Petitioners' motion for summary judgment is unreported, but is reproduced in the Appendix at A-8. The October 22, 1993 Opinion and Order of the United States District Court for the Southern District of Ohio, Eastern Division, denying Respondents' motion to alter or amend is unreported, but is reproduced in the Appendix at A-23. The March 22, 1995 Order of the United States District Court for the Southern District of Ohio, Eastern Division, enjoining Petitioners from applying § 5120:1-1-21 of the Ohio Administrative Code to members of the plaintiff class who committed initial offenses prior to the effective date of the rule, but whose parole revocation procedures are conducted after that date, is unreported, but is reproduced in the Appendix at A-28.

## JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on January 9, 1995. The Order denying rehearing was entered on February 28, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

**U.S. Const. Art. I, Section 10**

No State shall ... pass any ... ex post facto Law ... .

## STATEMENT OF THE CASE

### A. PROCEDURAL POSTURE

On August 15, 1990, Respondent Glenn S. Kellogg, an Ohio prison inmate, initiated this 42 U.S.C. § 1983 class action seeking declaratory and prospective injunctive relief with respect to certain parole revocation procedures. He alleged that Ohio's procedure for revoking the parole of parolees who are convicted of a new felony committed while on parole (referred to as "parole violators recommissioned" or "PVRs") violated his procedural due process rights under *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); and *Moss v. Patterson*, 555 F.2d 137 (6th Cir.), *cert. denied sub nom. Kette v. Moss*, 434 U.S. 873 (1977). Kellogg's claims invoked the court's jurisdiction under 28 U.S.C. § 1343.

Kellogg subsequently secured counsel who filed an amended complaint and moved to certify a class. The District Court certified the class to include "persons whose parole has been or will be revoked because they have been convicted of a subsequent felony committed while on parole." May 27, 1993 Opinion and Order, 1. After closure of discovery and the filing of motions for summary judgment, the District Court granted Petitioners leave to supplement the record with evidence that they had enacted an administrative rule which authorizes the summary revocation of parole in PVR cases

and deprives the revoking authority of any discretion not to revoke parole.[2]

The District Court found that the revocation procedures formerly employed by Petitioners failed to meet the requirements of *Morrissey*, 408 U.S. 471, and its progeny. However, the court granted summary judgment for Petitioners on the grounds that enactment of the new rule rendered moot the claims presented in the amended complaint. The court denied Respondents' motion for summary judgment. On June 15, 1993, Respondents moved to alter or amend the judgment, arguing, *inter alia*, that application of the new rule to persons whose initial offenses occurred prior to the effective date of the new rule violates the *ex post facto* bar. On October 22, 1993, the court denied the motion to alter or amend.

Respondents appealed on November 17, 1993. Notably, Petitioners did not cross-appeal the adverse determination on the merits of the due process claim. On January 9, 1995, the Sixth Circuit Court of Appeals issued its decision affirming the District Court's determination that Respondents' due process challenge was rendered moot by enactment of the new rule.[3] However, the Sixth Circuit Court of Appeals granted partial relief on the basis of Respondents' *ex post facto* claim.[4] The court identified a subclass against which the new rule could not be applied, *i.e.*, those mem-

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[2] *See* § 5120:1-1-21 of the Ohio Administrative Code ("O.A.C. § 5120:1-1-21"), reproduced in the Appendix at A-30. The Sixth Circuit Court of Appeals determined that the effective date of the rule is September 1, 1992. Further, effective October 6, 1994, Petitioners also amended § 2967.15 of the Ohio Revised Code ("O.R.C. § 2967.15"), the statute governing parole revocations in Ohio. O.R.C. § 2967.15(B) now denies the right to a parole revocation hearing to any "parolee, furloughee, or other releasee who is convicted of or pleads guilty to any offense committed while on parole, furlough, or other release". O.R.C. § 2967.15(B) is reproduced in the Appendix at A-31.

[3] Respondents have filed a petition for writ of certiorari in Case No. 94-9509 challenging the resolution of the due process issue.

[4] The court did not specifically address the effect of the recent amendment to O.R.C. § 2967.15 (B). *See* section I, A, 2, *infra*, as to the prejudicial impact of this amendment on parolees in Ohio.

bers of the class whose initial offenses were committed prior to the effective date of the new rule and whose parole is subject to revocation under the new rule.

On February 28, 1995, the Sixth Circuit Court of Appeals issued an order revising its January 9, 1995 opinion by striking certain language.[5] This order also denied the parties' petitions for rehearing.[6] The mandate issued on March 8, 1995. The District Court entered its order executing the mandate on March 22, 1995. Respondents moved to alter to amend this order on April 3, 1995 and said motion is pending before the court. On May 3, 1995, Petitioners filed a motion for relief from judgment to determine the effect of this Court's decision in *California Department of Corrections v. Morales*, ___ U.S. ___, 115 S.Ct. 1597 (1995), upon the Sixth Circuit's mandate herein. This motion is also pending before the District Court.

**B. CLARIFICATION OF MISLEADING PORTIONS OF PETITIONERS' STATEMENT OF THE CASE.**

Petitioners' Statement of the Case is misleading in the following respects. First, Petitioners state that the Sixth Circuit Court of Appeals sustained the mootness finding

[5] Thus, the opinion appearing at A-1 of Petitioners' petition does not reflect the final version of the court's opinion. See the published opinion reproduced herein at A-1.

[6] Respondents' petition for rehearing beseeched the court to address specifically their challenge to the due process rationale utilized by the District Court and the Court of Appeals. Respondents also requested a ruling on a *res judicata* issue which was briefed but neither addressed nor resolved by the court's January 9, 1995 opinion. The due process issue is the subject of Respondents' petition for writ of certiorari in Case No. 94-9509.

as to the entire class. Petition, 4. This is not so. The conclusion that the new rule may not be applied against the identified subclass means that the new law is a nullity as to that subclass. The original claims of the identified subclass cannot be rendered moot by a nullity. Their claims present a live controversy; otherwise, the Sixth Circuit's mandate granting the subclass declaratory and prospective injunctive relief would be meaningless.

Second, Petitioners devote three paragraphs of their petition to the fact that the conclusion of the January 9, 1995 opinion contained a phrase ("and also a parole violation offense conviction") which was entirely inconsistent with the rationale and language of the court's *ex post facto* discussion in the body of the opinion, *i.e.*, part III, C of the opinion. Petition, 4-5. Petitioners thereby suggest that the court, itself, was confused as to its holding and its reasons therefor. This characterization is wholly inaccurate and misleading. The phrase in question appears nowhere in the text of part III, C of the opinion. *Kellogg v. Shoemaker*, 46 F.3d 503, 509-10 (6th Cir. 1995). Nothing in the court's *ex post facto* discussion suggests that the date of the violation conviction is relevant to the *ex post facto* analysis in any way. In fact, the only mention of the subsequent violation offense in the court's opinion is in the context of clarifying that the date of the initial crime, rather than the violation, is the critical date for *ex post facto* purposes. *Kellogg*, 46 F.3d at, 510, n. 6. The inclusion of the phrase in the conclusion of the opinion was clearly anomalous and mistaken. The court recognized this fact in its February 28, 1995 Order when it corrected the mistake while, at the same time, it rejected Petitioners' plea to revisit this issue on rehearing.

As to the February 28, 1995 Order denying the petitions for rehearing, Petitioners criticize the court because it "declined to elaborate further on its *ex post facto* analysis." Petition, 5. This criticism is unfair because it erroneously implies that there was a need to elaborate on the *ex post facto* analysis in the January 9, 1995 opinion. Part III, C of the opinion, however, is unambiguous and requires no further elaboration. Moreover, it is unfair for Petitioners to criticize the court's refusal to countenance Petitioners' attempt to exploit the incongruity in the conclusion of the opinion so as to allow Petitioners to revisit on rehearing an issue which had already been fully briefed, argued, and resolved. Petitioners' petition for rehearing consisted solely of arguments which had already been made in their merit brief. Accordingly, there was no reason for the court to elaborate on its *ex post facto* analysis.

Third, the petition omits any reference to Petitioners' amendment of O.R.C. § 2967.15, effective October 4, 1994. As amended, O.R.C. § 2967.15(B) deprives any parolee of the right to a revocation hearing where the parolee has been "convicted of or pleads guilty to **any offense** committed while on parole" (emphasis added). This new statute is much broader than O.A.C. § 5120:1-1-21, which mandates summary revocation only for parolees who are convicted of an offense which requires sentencing the parolee to Petitioners' custody, *i.e.,* a felony conviction.

The new statute requires Petitioners to summarily revoke parole even for minor misdemeanor offenses committed while on parole. A conviction, for example, for violating a municipal ordinance prohibiting spitting on a sidewalk must result in returning the parolee to prison and revoking his or her parole without a hearing. Throughout the history of the Ohio parole system, traffic and misdemeanor offenses have been treated,

at most, as technical parole violations.[7] Persons charged with technical parole violations have always been entitled to the rights enumerated in *Morrissey*, 408 U.S. 471, and its progeny. Only persons convicted of felonies committed while on parole were subject to the PVR revocation process. *See* former O.A.C. § 5120:1-1-19(A). Thus, O.R.C. § 2967.15(B) fundamentally alters the parole revocation system in Ohio.[8] The critical point for the purposes of the instant petition is that, under the *ex post facto* analysis proposed by Petitioners, all parolees convicted of minor misdemeanor offenses while on parole **must** be returned to prison and **must** have their paroles revoked without a hearing regardless of whether their initial offense was committed prior to the effective date of the new statute.

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[7] Prior to the amendment, a parolee's supervising officer normally would not treat traffic and minor misdemeanor offenses as violations warranting revocation. Rather, the officer would impose lesser sanctions involving closer supervision of the parolee.

[8] Respondents advised the Sixth Circuit Court of Appeals of the amendment of O.R.C. § 2967.15 in their "Additional Citation." The court did not mention the new statute in its opinion. While the Sixth Circuit Court of Appeals did not address the effect of the new statute on the instant litigation, there is no doubt but that application of the rationale in the court's January 9, 1995 decision to the new statute would result in a finding that retrospective application of the new statute would violate the *Ex Post Facto* Clause.

## REASONS FOR DENYING THE WRIT

**I. THE GROUNDS SET FORTH IN THE PETITION ARE INSUFFICIENT TO WARRANT GRANTING A WRIT OF CERTIORARI. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S DECISION IN *CALIFORNIA DEPARTMENT OF CORRECTIONS V. MORALES*, ___ U.S. ___, 115 S.Ct. 1597 (1995). THUS, GRANTING THE PETITION AND REMANDING FOR FURTHER CONSIDERATION IN LIGHT OF *MORALES* IS UNWARRANTED.**

The questions presented for review in the petition fail to state sufficient grounds to warrant this Court's exercise of its jurisdiction.[9] At bottom, Petitioners' claims can be reduced to two assertions: (1) in their first question presented for review, Petitioners assert that the Sixth Circuit Court of Appeals failed to follow the *ex post facto* analysis set forth in *Collins v. Youngblood*, 497 U.S. 37 (1990); and *California Department of Corrections v. Morales*, __ U.S. __, 115 S.Ct. 1597 (1995); and (2) in their second question presented for review, Petitioners argue they should be permitted to revive a defense which the District Court rejected as specious, which Petitioners waived by failing to cross-appeal, and which the Sixth Circuit had no opportunity to review due to Petitioners' waiver. As demonstrated below, both of these assertions are groundless and fail to warrant this Court's granting the writ of certiorari.

Preliminarily, it is noteworthy that Petitioners waived several opportunities to ensure that the Sixth Circuit Court of Appeals would have the benefit of this Court's resolution of *Morales*, 115 S.Ct. 1597, when it decided this case. On October 12, 1994, Respondents filed their "Additional Citation" in which they advised the Sixth Circuit Court of

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[9] Petitioners do not assert that this case presents an issue on which there is a conflict among the circuits. Nor do they assert that there is a conflict between the decision below and that of any state court of last resort. Petitioners do not, and cannot, allege that the case involves a question which has not been resolved by this Court. Petitioners likewise do not attempt to demonstrate that the proceedings before the Sixth Circuit Court of Appeals were such that they warrant the exercise of this Court's supervisory jurisdiction.

Appeals and Petitioners that this Court had recently granted review in *Morales*, *id* Moreover, Respondents' counsel raised the matter at oral argument before the Sixth Circuit and the court entertained a brief colloquy on *Morales* during Respondents' argument. At no time did Petitioners move for a stay pending this Court's decision in *Morales*. Nor did Petitioners move the Court of Appeals to recall the mandate after this Court rendered the *Morales* decision. The fact that the court decided this case without *sua sponte* ordering a stay, coupled with Petitioners' failure to request a stay, indicates that the parties and the court unanimously concluded that the issues in *Morales* are easily distinguishable from those in the instant case. Certainly, Petitioners' inaction in the face of the proceedings in *Morales* speaks louder than the belated pleas in their petition before this Court.

Respondents demonstrate below that the decision of the Sixth Circuit is consistent with the analysis applied by this Court in *Morales*. Application of the new rule retrospectively to members of the identified subclass[10] will result in the effect prohibited by the *Ex Post Facto* Clause, *i.e.*, it will increase the time spent in prison on the initial

[10] The term "identified subclass" refers to the subclass of the plaintiff class against whom the Sixth Circuit Court of Appeals determined application of the new rule is barred by the *Ex Post Facto* Clause. The subclass consists of those class members whose initial crimes were committed before the effective date of the rule and who are subject to parole revocation under the rule. *See Kellogg v. Shoemaker*, 46 F.3d 503, 509-10 (1995).

crime[11] where the sentence for the new offense is stayed, suspended, modified, vacated, or has expired. Petitioners' contrived readings of the opinion below and of this Court's decision in *Morales* are unavailing. There is, then, no reason justifying a grant of certiorari and referral back.

**A. THE STATUTE AT ISSUE IN *MORALES*, 115 S.CT. 1597, IS SUBSTANTIVELY DIFFERENT FROM THAT IN THE INSTANT CASE. ACCORDINGLY, *MORALES* IS INAPPOSITE AND DOES NOT WARRANT GRANTING REVIEW OR REMAND.**

The most critical distinction between *Morales*, 115 S.Ct. 1597, and the instant case consists in the differences between the statutes scrutinized therein. *Morales* involved an amendment to a statute governing the frequency with which a very limited class of inmates is permitted to appear before the parole board, after the initial parole suitability hearing, for a determination whether the inmate is suitable for release prole.[12] The Court repeatedly emphasized that the statute did **not** modify "the standards for fixing a prisoner's initial date of 'eligibility' for parole", and that it did not modify the standards for determining an inmate's "'suitability' for parole and setting his release date". *Morales, id.* at 1602. *See also id.* at 1602 (the statute "simply 'alters the method to be followed' in fixing a parole release date under identical substantive standards."); and *id.* at 1604 ("The amendment has no effect on the date of any prisoner's initial parole suitability hearing; it affects the timing only of subsequent hearings.").

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[11] The term "initial crime" is a term of art which the Sixth Circuit Court of Appeals used to refer to "the crime from which the inmate has been paroled. It does not refer to the subsequent violation while on parole." *Kellogg*, 46 F.3d at 510, n. 6.

[12] In an effort to convince this Court to grant review, Petitioners distort the analysis and result in *Morales*. For example, Petitioners describe *Morales* as reviewing a statute which modified parole eligibility standards. *See* section I, A, 1, *infra*.

The crucial consideration in this Court's analysis was whether the "amendment will have any effect on any prisoner's actual term of confinement." *Morales, id.* at 1604; *also, see id.* at 1605 ("Such a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings."); and *id.* at 1602, n. 3 ("After *Collins* [*v. Youngblood,* 497 U.S. 37, (1990),] the focus of the *ex post facto* inquiry is *** on whether any such change *** increases the penalty by which a crime is punishable."). Since the amendment merely altered the method to be followed in establishing a release date, but did not modify the substantive standards for establishing that release date, the Court concluded that retrospective application of the amendment was not barred by the *Ex Post Facto* Clause. *Id.* at 1602.

O.A.C. § 5120:1-1-21 differs from the amendment at issue in *Morales* in the following important respects. First, O.A.C. § 5120:1-1-21 regulates parole revocation proceedings rather than parole release suitability proceedings. The decision to revoke parole directly implicates the concerns behind the *Ex Post Facto* Clause because it amounts to imposition of additional punishment for the initial crime. Second, O.A.C. § 5120:1-1-21 will have the direct and immediate effect of increasing the actual terms of confinement for some members of the identified subclass. Finally, enactment of O.A.C. § 5120:1-1-21 modified the substantive standards for determining whether parole should be revoked. These distinguishing features not only demonstrate why the Sixth Circuit Court of Appeals found an *ex post facto* violation in this case, but also that this conclusion is consistent with *Morales*.

1. **UNLIKE THE AMENDMENT AT ISSUE IN MORALES, 115 S.CT. 1597, O.A.C. § 5120:1-1-21 INVOLVES THE DECISION TO REVOKE PAROLE AND IMPOSE ADDITIONAL CONFINEMENT FOR THE INITIAL OFFENSE. THIS DETERMINATION DIRECTLY IMPLICATES THE CONCERNS EMBODIED IN THE *EX POST FACTO* CLAUSE AS CONSTRUED IN *MORALES*.**

As a point of departure, it is vital to recognize that the decision to revoke parole constitutes the imposition of additional punishment for the initial crime. This is patently clear in the technical parole violation context. It is equally true in the PVR context, notwithstanding that a new sentence has been imposed. The new sentence punishes the new criminal conduct and is not coextensive with the parole revocation. As the District Court held, "Moreover, *Moody v. Daggett,* 429 U.S. 78 (1976), made clear that a parolee's incarceration on an entirely new charge is not coextensive with the revocation of his parole."[13] May 27, 1993 Opinion and Order, 7. The confinement for the parole violation is independent of the new sentence. If the new sentence is terminated in some way, as demonstrated in section I, A, 2, *infra*, the revocation decision will prevent the parolee's release.

The decision to revoke parole entails two components. The first component is the revoking authority's decision to re-confine the parolee to an additional term of imprisonment on the initial crime because of the parole violation. The second component is the revoking authority's determination of how much additional confinement for the initial crime is warranted by the parole violation. In other words, the parole revocation decision amounts precisely to the imposition of additional punishment for the initial crime, the key factor in the *ex post facto* analysis in *Morales*, 115 S.Ct. 1597. This feature was lacking in the amendment at issue in *Morales*. Presumptively, a law which

[13] Petitioners did not appeal this adverse determination and have waived any challenge thereto.

mandates the imposition of an additional prison term in parole revocation proceedings is far more likely to implicate the concerns behind the *Ex Post Facto* Clause than a statute which merely modifies the frequency with which an inmate is considered for parole release suitability.

In this regard, the Petition consistently mischaracterizes the amendment reviewed in *Morales*. Petitioners repeatedly assert that the statute in *Morales* modified parole eligibility standards and that *Morales* clarified the *ex post facto* implications of such changes. Petitioners then erroneously equate parole eligibility proceedings with parole revocation proceedings for *ex post facto* purposes. Referring to *Morales*, *id.* at 1602, n. 3, Petitioners state:

> Accordingly, the Court discredited totally the premise that a change in **parole eligibility** rules, by virtue of a possible effect upon the prisoner's opportunity for early release, should be equated ipso facto with a retrospective increase in punishment prohibited by the ex post facto clause. (Emphasis added.)

Petition, 9.[14]

As indicated above, the amendment reviewed in *Morales* had nothing to do with the standards for establishing parole eligibility. While the amendment changed the procedures for determining an inmate's suitability for release, it left untouched the standards for becoming eligible for parole. The statute did not retroactively terminate a prisoner's parole eligibility, it only reduced the frequency of suitability hearings. This

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[14] *See also* Petition, 11 ("As the Court made clear in *Morales*, a change in **parole eligibility** rules cannot be considered ipso facto to effect an increase in punishment for the purposes of the ex post facto clause." (emphasis added)); and Petition, 13 ("Unlike **parole eligibility** rules, a change in parole revocation procedures cannot in any way increase the amount of time an inmate must serve before obtaining release on parole." (emphasis added)).

Court carefully pointed out at several points in its decision that the case does not involve a change in parole eligibility. *Morales, id.* at 1602 ("The amendment had no effect on the standards for fixing a prisoner's initial date of eligibility for parole, *** or for determining his 'suitability' for parole and setting his release date *** ."); and *id.* at 1604.

Petitioners overlook the significant, substantive difference between parole eligibility and suitability for release on parole. Serious *ex post facto* implications attach to changes in parole eligibility matters. *Warden v. Marrero,* 417 U.S. 653, 663 (1974). These implications were not addressed in *Morales,* notwithstanding Petitioners' assertions otherwise. Even more serious *ex post facto* implications attach to modifications in parole revocation proceedings, because revocation of parole constitutes imposition of additional punishment for the initial crime. *Morales* clearly does not address these more serious issues.

**2. O.A.C. § 5120:1-1-21 WILL HAVE THE DIRECT AND IMMEDIATE EFFECT OF INCREASING THE ACTUAL TERMS OF CONFINEMENT FOR SOME MEMBERS OF THE IDENTIFIED SUBCLASS, UNLIKE THE AMENDMENT AT ISSUE IN *MORALES*, 115 S.CT. 1597.**

As indicated *supra,* the crucial fact for *ex post facto* purposes under *Morales,* 115 S.Ct. 1597, and *Collins,* 497 U.S. 37, is whether the new law will have any effect on any prisoner's actual term of confinement. *Morales, id.* at 1602, n. 3, 1604, and 1605. O.A.C. § 5120:1-1-21, when applied retrospectively, unquestionably will have the direct and immediate effect of increasing the actual terms of confinement for some members of the identified subclass.

Former O.A.C. § 5120:1-1-19, the law in effect when the members of the identified subclass committed their initial offenses, provided that:

> (A)(1) In the event a releasee is convicted and sentenced on a new felony under Ohio law, it shall be conclusively presumed that Administrative Regulation 5120:1-1-12 has been violated. In such cases, as applicable, the parole revocation hearing will be confined to the determination of mitigating circumstances.
>
> ***
>
> (D) If at the hearing it is found by substantial evidence considering the record as a whole, that the alleged violation has been proved and that mitigating circumstances, if any, do not make revocation inappropriate, release shall be revoked by the Parole Board.
>
> (E) If the hearing panel, in its discretion, determines that revocation of release is inappropriate even if the alleged violation has been proved, the inmate shall be released to his former status, provided, however, that in the discretion of the Parole Board the terms and conditions of release may be modified *** .

Under this rule, members of the identified subclass could avoid revocation by establishing sufficient mitigating circumstances to satisfy the panel that revocation would be inappropriate. The subclass members also were entitled to enjoy the panel's exercise of its discretion not to revoke parole.

O.A.C. § 5120:1-1-21 terminates these rights. It deprives the revoking authority of any discretion to find that mitigating factors render revocation inappropriate and to order the parolee restored to parole. It also deprives the parolee of the right to a meaningful hearing on mitigation. By terminating these rights, O.A.C. § 5120:1-1-21 will increase the term of confinement some subclass members will serve on their initial crimes. The subclass members who will be prejudiced are those who are able to secure release from the new sentence and who would otherwise be restored to parole, but for the parole revocation under O.A.C. § 5120:1-1-21.

There are many situations under Ohio law in which a PVR may secure release from the sentence for the new offense, *e.g.*, by being granted probation, shock probation, or an appeal bond, or by securing correction, modification, or vacation of the sentence by way of direct or collateral review. In addition, the new sentence could simply expire.[15] *See, e.g., State ex rel. Jackson v. Denton,* 5 Ohio St.3d 179 (1983) (where Petitioners revoked a PVR's parole without a mitigation hearing even though the trial court granted probation on the new offense knowing the defendant was on parole at the time of the offense). It is precisely in situations where the new sentence is suspended, modified, or vacated that mitigating circumstances are most likely to exist.

Under former O.A.C. § 5120:1-1-19, a PVR who presented sufficient mitigation could be released from prison and restored to parole. O.A.C. § 5120:1-1-21 has extinguished that possibility. By doing so, the new rule will cause such PVRs to be confined on the initial sentence for a longer time than they would have been under the former rule. This is exactly the "effect" the Court in *Morales* recognized as prohibited by the *Ex Post Facto* Clause. *Morales,* 115 S.Ct. at 1603; *Collins*, 497 U.S. at 43; *accord Beazell v. Ohio*, 269 U.S. 167, 171 (1925) ("the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation"). The amendment in *Morales* survived scrutiny under the *Ex Post Facto* Clause because it did not result in such additional confinement for the initial crime.

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[15] This scenario will occur more frequently as a result of the amendment to O.R.C. § 2967.15. Vast numbers of parolees will be returned to prison for minor misdemeanor offenses which may not even result in a term of confinement at all. Similarly, many PVRs will be returned to a state penal institution for misdemeanor convictions in which they were sentenced to time served in the local jail or where their local jail sentences have already expired by the time they are conveyed to prison for the parole revocation.

### 3. ENACTMENT OF O.A.C. § 5120:1-1-21 MODIFIED THE SUBSTANTIVE STANDARDS FOR DETERMINING WHETHER PAROLE SHOULD BE REVOKED IN PVR CASES.

The amendment construed in *Morales*, 115 S.Ct. 1597, is also distinguishable on the basis that, as the Court repeatedly stated, the amendment did not alter the standards for determining parole eligibility or parole suitability. Likewise, it did not modify the substantive standards for fixing a parole release date. O.A.C. § 5120:1-1-21, however, effectuated a substantive change in the standards for determining whether parole should be revoked in PVR cases. In other words, the new rule changed the substantive standards for determining whether additional confinement for the initial crime is warranted by the parole violation.

Under the rule in effect when the members of the identified subclass committed their initial crimes, the standard for determining whether to revoke parole in PVR cases was a discretionary one and permitted restoration to parole notwithstanding the parole violation. Former O.A.C. § 5120:1-1-19(A), (D), and (E). Specifically, the standard formerly applied was that parole would be revoked except where the panel, in its discretion and after a meaningful mitigation hearing, determined that mitigating circumstances rendered revocation inappropriate. *Kellogg*, 46 F.3d at 509.

Enactment of O.A.C. § 5120:1-1-21 fundamentally changed the prior standard by mandating that Petitioners revoke parole in every PVR case, regardless of any mitigating factors in a particular case. The new rule provides, in pertinent part:

> (A) The adult parole authority shall revoke the release of any releasee who is recommitted to the department of rehabilitation and correction to serve a sentence imposed upon him by any court in Ohio for an offense he committed while on any release granted by the adult parole authority ***.

> (B) This revocation shall be accomplished by the issuance of minutes by the adult parole authority after it has verified that the sentence was imposed for an offense that occurred while the prisoner was under release status.

Enactment of this rule constituted imposition of a mandatory revocation standard where a discretionary one previously existed.[16] Petitioners have no legal alternative but to revoke parole in PVR cases. The rule eliminates the right to a mitigation hearing and to the panel's exercise of discretion to restore a PVR to parole in light of the mitigating circumstances. Further, the court below recognized that Petitioners enacted the new rule for the precise purpose of imposing a new standard for revoking parole in PVR cases:

> Thus, the agency can "declare" a parolee to have been convicted of a subsequent violation while on a parole to be a "violator" either by administrative rule, or through an individual hearing. The agency has chosen to address these cases by administrative rule *** .

*Kellogg*, 46 F.3d at 507-08.

Petitioners assert that, "the substantive standards for determining whether parole should be revoked were not altered by the rule change." Petition, 13. This assertion defies reason. O.A.C. § 5120:1-1-21 clearly reflects the codification of Petitioners' judgment that parolees who commit felonies while on parole must always have their parole summarily revoked regardless of any mitigating factors which may exist in an individual case and regardless of whether, for example, the new sentence is overturned on

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[16] This is similar to the change which the Court found violated the *Ex Post Facto* Clause in *Lindsey v. Washington*, 301 U.S. 397 (1937). There, the statute modified the sentencing standard from one which **allowed** imposition of a fifteen (15) year sentence to one which **required** a fifteen (15) year sentence. *See Dobbert v. Florida*, 432 U.S. 282, 300 (1977) ("[U]nder the new law it was the only sentence he could

appeal or suspended by the trial court.[17] This new standard is clearly at odds with the provisions of former O.A.C. § 5120:1-1-19.

Additionally, Petitioners argue that the revocation standards have not changed because, "even under the old rule, inmates who were convicted of crimes committed while on parole were conclusively presumed to be parole violators." Petition, 13. Petitioners are mixing apples with oranges. Under both the new and former rules, there is a conclusive presumption of a parole violation. *See Gagnon v. Scarpelli,* 411 U.S. 778 (1973). This standard has not changed. What has changed is the standard applied to the next step of the revocation decision, *i.e.,* whether the violation warrants revocation or some lesser sanction.

Petitioners also assert that "Respondents argued from the outset that the PVR revocation process under the old rule resulted in the revocation of parole in every case in which the PVR was found to have been convicted of a felony while on parole." Petition, 13, n. 4. That is, Petitioners attempt to prove that enactment of O.A.C. § 5120:1-1-21 worked no change in the revocation standards because the results of the "hearings" under the former rule and those obtained under the new rule are identical.[18] This argument fails to prove that the legal standards have not changed; it only establishes

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have received, while under the old law the sentencing judge could in his discretion have imposed a much shorter sentence.").

[17] Petitioners admitted under questioning at oral argument below that, even where a PVR's new conviction is reversed on appeal, Petitioners will not restore the PVR to parole, but will retain the PVR in custody until the PVR can obtain release through further litigation, *e.g.,* by filing a state habeas corpus action.

[18] Respondents established in their motion for summary judgment that Petitioners have never failed to revoke a PVR's parole. However, Respondents' proof also demonstrates that Petitioners have never conducted a PVR revocation hearing that comports either with the requirements of due process or with former O.A.C. § 5120:1-1-19. Even though Petitioners represented to the court in *Moss v. Patterson,* 555 F.2d 137, 138 (6th Cir.), *cert. denied sub nom., Kette v. Moss,* 434 U.S. 873 (1977), that they were providing hearings to PVRs under former O.A.C. § 5120:1-1-19, and even though the court in *Moss, id.,* specifically

that, by enacting the new rule, Petitioners legitimated a practice which was illegal under the former rule.[19] Petitioners' illegal conduct in failing to satisfy the former standard cannot prove that the former standard did not exist. It is, indeed, spurious for Petitioners to argue that their illegal conduct defines the legal standard in effect under the former rule.

It is obvious, then, that O.A.C. § 5120:1-1-21 establishes a new standard for determining whether parole should be revoked in PVR cases. Likewise, this new standard is more onerous than the standard under former O.A.C. § 5120:1-1-19. As a result of the new standard, many subclass members will spend more time in prison for their initial crimes than they would have under the former rule. These factors clearly distinguish O.A.C. § 5120:1-1-21 from the amendment addressed in *Morales*, 115 S.Ct. 1597, and just as clearly establish a violation of the *Ex Post Facto* Clause.

### B. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY FOUND THAT RETROSPECTIVE APPLICATION OF O.A.C. § 5120:1-1-21 VIOLATES THE *EX POST FACTO* CLAUSE BECAUSE SUCH APPLICATION WILL RESULT IN INCREASING THE AMOUNT OF TIME MEMBERS OF THE IDENTIFIED SUBCLASS WILL SPEND IN PRISON ON THE INITIAL CRIME.

#### 1. THE ANALYSIS BELOW.

The Sixth Circuit properly found that retrospective application of O.A.C. § 5120:1-1-21 violates the *Ex Post Facto* Clause because such application will result in increasing the amount of time members of the identified subclass will spend in prison. The

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held that PVRs are entitled to due process in the revocation of their paroles, not a single constitutionally adequate PVR revocation hearing has ever been conducted in Ohio.

[19] The District Court found that the procedures Petitioners actually applied under the former law failed to satisfy the requirements of due process. May 27, 1993 Opinion and Order, 5-7. Petitioners did not cross-appeal.

court's analysis is straightforward and falls well within the contours of this Court's *ex post facto* jurisprudence. *See Kellogg*, 46 F.3d at 509-10.

First, the court notes the traditional test for establishing an *ex post facto* violation: the law must (1) "be retroactive in application, and (2) 'must disadvantage the offender affected by it.'" *Kellogg, id.* at 509, quoting *Miller v. Florida*, 482 U.S. 423, 430 (1987); *accord Dobbert v. Florida*, 432 U.S. 282, 294 (1977) ("It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law."). The court also notes the axiom that the focus of the analysis "is the time the offense was committed." *Kellogg, id.; Weaver v. Graham*, 450 U.S. 24, 30-31 (1981).

The court then addresses the "disadvantage" or "more onerous" prong of the analysis. The court focuses on the substantive/procedural distinction because Petitioners argued that the rule was a mere procedural change. Applying *Dobbert*, 432 U.S. at 293, and *Miller*, 482 U.S. at 433, and upon finding that the new rule "affects substantive rights," the court concludes that "the new regulations may violate the *Ex Post Facto* Clause for a portion of the plaintiff class." *Kellogg, id. Accord Collins*, 497 U.S. at 45 ("While these cases do not explicitly define what they mean by the word 'procedural,' it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes."). Finally, the court determines that the new rule is retrospective as to the subclass of PVRs "who committed their initial crime before the new regulations came into effect but whose parole revocation proceedings will be governed by the new regulations." *Kellogg, id.* at 510.

The only aspect of the Sixth Circuit Court of Appeals' analysis which is arguably implicated by *Morales*, 115 S.Ct. 1597, is the discussion of the "disadvantage" prong of the *ex post facto* test. The retrospectivity prong of the *ex post facto* test was not litigated in *Morales*. In this regard, Petitioners again mischaracterize *Morales* by alleging that *Morales* held it to be error to look to the time of the initial crime in determining whether the law is retrospective for *ex post facto* purposes. Petitioners assail *Rodriguez v. United States Parole Commission*, 594 F.2d 170 (7th Cir. 1979). Petition, 10-11. Petitioners argue that *Morales* made it clear that "the Sixth Circuit's reliance on *Rodriguez* in focusing on the time of the inmate's initial offense was erroneous." *Id.* at 11.

This Court's opinion in *Morales* is void of any reference to the issue of whether the date of the initial crime or the date of the violation offense is the operative date for *ex post facto* purposes. This question was simply not presented. Petitioners do not cite any language in *Morales* to support their proposition because no such language exists. Accordingly, *Morales* does not warrant a remand on this issue.

Furthermore, the Sixth Circuit's resolution of this issue comports with this Court's *ex post facto* precedent. The court below specifically cited this Court's decision in *Weaver*, 450 U.S. 24, in support of its conclusion on this issue. In *Weaver*, this Court rejected the argument Petitioners made below and which they now repeat in their Petition. There, the Court looked to the date of the commission of the offense as the key date. *Weaver, id.* at 31 ("The critical question is whether the law changes the legal consequences of acts completed before its effective date."); *accord Miller*, 482 U.S. at 430.

Petitioners overlook the Sixth Circuit's reliance on *Weaver, id.*, in support of this proposition and focus only on *Rodriguez*, 594 F.2d 170. They fail to advise this Court that, in order to adopt their position, this Court must overrule *Weaver, id.*, not to mention the many circuit court decisions on this point. Petitioners' attack upon this well settled principle of *ex post facto* jurisprudence is utterly groundless and fails to warrant review or a remand.

**2. THE ANALYSIS BELOW IS CONSISTENT WITH *MORALES*, 115 S.CT. 1597, *COLLINS*, 497 U.S. 37, AND *DOBBERT*, 432 U.S. 282 (1977).**

**a. THE SIXTH CIRCUIT'S DECISION ADOPTED THE SUBSTANTIVE/PROCEDURAL ANALYSIS IN *MILLER V. FLORIDA*, 482 U.S. AT 433, AND *DOBBERT V. FLORIDA*, 432 U.S. AT 293-94, NOT THE "SUBSTANTIAL DISADVANTAGE" APPROACH TAKEN IN *LINDSEY V. WASHINGTON*, AT 401. THIS COURT'S REAFFIRMATION OF *MILLER'S* SUBSTANTIVE/PROCEDURAL ANALYSIS IN *MORALES*, 115 S.CT. AT 1602, VINDICATES THE SIXTH CIRCUIT'S RESOLUTION OF THE ISSUE. PETITIONERS GROSSLY MISCHARACTERIZE THE *EX POST FACTO* RATIONALE APPLIED BY THE SIXTH CIRCUIT COURT OF APPEALS.**

The Petition is laden with gross mischaracterizations of the *ex post facto* rationale applied by the Sixth Circuit Court of Appeals. In fact, the core of Petitioners' argument is based upon a fundamental mischaracterization of the Sixth Circuit's opinion. Petitioners erroneously allege that the court below applied the "substantial disadvantage" rationale which this Court decried in *Morales*, 115 S.Ct. at 1602, n. 3. Petitioners state:

> [T]he Sixth Circuit's resolution of the inmates' *ex post facto* claim hinged upon two basic conclusions: *** second, elimination of the mitigation hearing could not be done "retrospectively" because it would amount to a "substantial disadvantage" prohibited by the *ex post facto* clause.

Petition, 10.[20] This characterization is entirely inaccurate and is intended for the self-serving purpose of bringing the case within the purview of this Court's comments in *Morales, id.* at 1602, n. 3.

The Sixth Circuit did not utilize the "substantial disadvantage" rationale, but analyzed the case with a view to whether the rule worked a procedural or a substantive change. Neither Respondents' claims nor the Sixth Circuit's decision depend upon the "substantial disadvantage" analysis which originated in *Lindsey v. Washington*, 301 U.S. 397, 401 (1937), and which was disapproved of in Morales, 115 S.Ct. 1597.[21] Although the court used the term "disadvantage," it was not with the meaning this Court denounced in *Morales, id.* at 1602, n. 3, *i.e.*, in the sense of the "substantial disadvantage" language of *Lindsey*, 301 U.S. at 401. The court below simply used "disadvantage" as a shorthand reference to the requirement that the new law be "more onerous" than the old law. Surely the Court did not intend in *Morales*, *id.* at 1602, n. 3, to disapprove of this prong of the traditional analysis. To the contrary, the Court cites

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[20] *Also see* Petition, 6 (characterizing the Sixth Circuit's decision as finding an *ex post facto* violation "solely on the ground of an alleged 'substantial disadvantage' to the inmates"); Petition, 11 ("Of course, it was the elimination of this hearing which the Sixth Circuit found to be a 'substantial disadvantage' precluded by the *ex post facto* clause."); and Petition, 12 ("The Sixth Circuit focused exclusively on the alleged 'substantial disadvantage' to the inmates ***.").

[21] The Court in *Morales* generally cites *Lindsey* with approval. *Morales, id.* at 1601-02. The only disapproving note is sounded in footnote 3, where the Court disapproves only of the "substantial disadvantage" language in *Lindsey, id.* at 401, which was repeated in *Weaver, 450 U.S.* at 29, and *Miller, id.* at 433. This language applied the *ex post facto* bar to laws which merely "disadvantage" offenders, but which do not "alter the definition of criminal conduct or increase[ ] the penalty by which a crime is punishable." *Morales, id.* at 1602, n. 3. The proper exegetical analysis of *Morales'* footnote 3 must begin with the cited portions of *Lindsey, Weaver,* and *Miller* laid out side-by-side. This method demonstrates that the common thread linking these citations is *Lindsey's* "disadvantage" language. It is the ambiguity of "disadvantage" which the Court specifically assails in footnote 3.

with approval language in *Dobbert*, 432 U.S. at 294, applying the "more onerous" requirement. *Morales*, *id.* at 1603.[22]

The issue upon which the decision below turned was whether, as Petitioners argued, the new rule was merely procedural and, therefore, not subject to the *ex post facto* bar. *Kellogg*, 46 F.3d at 509. The determinative factor in the Sixth Circuit's analysis was its reliance on *Miller*, 482 U.S. at 433. The decision in *Miller* incorporated both the "substantial disadvantage" language cited in *Morales*, *id.* at 1602, n.3, and the substantive/procedural analysis. *Miller*, *id.* The Sixth Circuit relied not on the "substantial disadvantage" language, but on the discussion of the substantive/procedural issue. Immediately after the "substantial disadvantage" discussion, the Court in *Miller* addressed the substantive/procedural distinction:

> Finally, even if a law operates to the defendant's detriment, the *ex post facto* prohibition does not restrict "legislative control of remedies and modes of procedure which do not affect matters of substance." *Dobbert, 432 U.S.*, at 293 ***. Hence, no *ex post facto* violation occurs if the change in the law is merely procedural and does "not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." *Hopt v. Utah*, 110 U.S. 574, 590 *** (1884). See *Dobbert, supra*, at 293-294 *** ("The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime"). On the other hand, a change in the law that alters a substantial right can be *ex post facto* "even if the statute takes a seemingly procedural form." *Weaver*, 450 U.S., at 29, n. 12 ***.

*Miller*, *id.* at 433. This is the language cited by the Sixth Circuit. *Kellogg*, *id.* at 509.

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[22] The court's use of "disadvantage" in reference to the "more onerous" prong is also consistent with *Collins*, 497 U.S. at 41, ("[I]t has long been recognized that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them.").

More importantly, the Sixth Circuit's resolution of the substantive/procedural issue is consistent with *Collins*, 497 U.S. 37. This is critical because, unlike the situation in *Morales,* the Court in *Collins* directly addressed the substantive/procedural distinction. There, the court summarized its view of the relevant precedent as follows:

> We think the best way to make sense out of this discussion in the cases is to say that by simply labeling a law "procedural," a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause. *** Subtle ex post facto violations are no more permissible than overt ones. In *Beazell* [*v. Ohio*, 269 U.S. 167 (1925)], we said that the constitutional prohibition is addressed to laws, "whatever their form," which make innocent acts criminal, alter the nature of the offense, or increase the punishment. *Id.*, 269 U.S. , at 170.

*Collins, id.* at 47. Accordingly, under both *Collins* and *Morales,* the ultimate question is whether the new rule, whether procedural or not, increases the punishment for the initial crime for some members of the identified subclass. The Sixth Circuit's analysis was aimed at precisely that question.

Additionally, this Court's reasoning *Morales* specifically vindicates the Sixth Circuit's reliance on *Miller, id.* In *Morales,* the Court specifically cited the above-quoted portion of *Miller* with approval:

> Rather than changing the sentencing range applicable to covered crimes, the 1981 amendment simply "alters the method to be followed" in fixing a parole release date under identical substantive standards. See *Miller, supra,* 482 U.S. at 433 *** (contrasting adjustment to presumptive sentencing range with change in "the method to be followed in determining the appropriate sentence"); see also *Dobbert v. Florida,* 432 U.S. 282, 293-294 *** (1977) (contrasting change in the "quantum of punishment" with statute that merely "altered the methods employed in determining whether the death penalty was to be imposed").

*Morales, id.* at 1602. This language exposes the fallacy in Petitioners' argument that the Sixth Circuit's decision represents the "broader" approach rejected in *Morales, id.* at 1602, n. 3. Since this Court incorporated into its analysis in *Morales* the same language the court below relied upon to reach its decision, *Morales* provides no basis for granting review or requiring a remand.

**b. NOTWITHSTANDING PETITIONERS' GROSS MISCHARACTERIZATIONS TO THE CONTRARY, THE SIXTH CIRCUIT'S DECISION TURNED UPON WHETHER O.A.C. § 5120:1-1-21 WILL INCREASE THE ACTUAL TIME MEMBERS OF THE IDENTIFIED SUBCLASS WILL BE CONFINED FOR THE INITIAL CRIME.**

Petitioners grossly misrepresent the Sixth Circuit's decision by claiming that the court failed to consider whether the change in the law will have an impact on any prisoner's actual term of confinement. "In contrast, the Sixth Circuit in this case focused exclusively on a perceived change in conditions, without considering whether the change had an impact on the sentence." Petition, 9.[23]

The Sixth Circuit's decision turned on the fact that the new rule will result in increasing the time served in prison on the initial crime for many PVRs. The court found an *ex post facto* violation because the new rule deprives some PVRs of "substantive rights attendant to parole revocation." *Kellogg*, 46 F.3d at 509. As the court reasoned:

> Although the change here involves a procedural matter - the right to a hearing on revocation of parole - it still affects substantive rights attendant to parole revocation. Under the old regulations, parole would be revoked for the full amount of time *unless* the inmate could convince the parole authority that mitigating circumstances warranted mercy. Under the new procedures, there is no opportunity to present these mitigating circumstances. This procedural change affects *substantive* rights. (Emphasis in original.)

[23] *Also see* Petition, 12 ("The Sixth Circuit *** did not address the fundamental question of whether the change in parole revocation rules resulted in an increase in punishment for the inmates' initial offenses.").

*Kellogg, id.* While framed in substantive/procedural terms, the court's analysis nevertheless turned on whether the new rule increases the punishment for the initial crime. The court properly focused on the key fact, *i.e.*, that the new rule deprives the PVRs of the right to an opportunity to avoid an increased sentence for the initial crime.

The factor that makes these rights substantive ones is the same factor that satisfies the *ex post facto* analysis in *Collins*, 497 U.S. 37,[24] and *Morales*, 115 S.Ct. 1597, *i.e.*, that the new rule mandates additional incarceration on the initial crime, even where the new sentence is stayed, suspended, modified, vacated, or expires, and eliminates the possibility of continued release on parole despite the violation. Therefore, the decision below is consistent with both *Morales* and *Collins*.

It is the Petitioners, not the court below, who have consistently failed to incorporate into their analysis the practical effect of the new law on the sentences served by members of the identified subclass for their initial crimes. Not once in the course of this litigation have Petitioners rebutted Respondents' arguments regarding the confining effect of the revocation decision where the sentence for the new offense is stayed, suspended, modified, vacated, or has expired.[25] While Petitioners do make the conclusory statement that "a change in parole revocation procedures cannot in any way increase the amount of time an inmate must serve before obtaining release on parole", they present no authority or argument to justify that conclusion. Petition, 13. Yet, simply assert-

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[24] This Court did not address the substantive/procedural distinction in *Morales*. Rather, that issue was addressed five years ago in *Collins*. Accordingly, *Morales* provides no justification warranting a remand.

[25] Due to the radical breadth of O.R.C. § 2967.15(B), there will be increasingly larger numbers of PVRs who are returned to prison after having already completed their sentences in local jails or who will not have received a sentence of confinement at all, *i.e.*, where the conviction is for a minor misdemeanor offense.

ing the proposition does not make it true. Moreover, Petitioners' logic is inherently flawed. What is a parole revocation if not the execution of an additional portion of the initial sentence?[26] Petitioners have no response to Respondents' argument because their analysis simply cannot account for the reality that PVRs will spend more time in prison on the initial crime when the new sentence no longer requires detention.

**c. The result below is consistent with *Morales*, 115 S.Ct. 1597, and Collins, 497 U.S. 37.**

Regardless of the validity of its analysis, the result reached by the Sixth Circuit is consistent with *Morales*, 115 S.Ct. 1597, and *Collins*, 497 U.S. 37. The Court held that the *Ex Post Facto* Clause prohibits retrospective application of laws which increase the penalty by which a crime is punishable. *Morales, id.* at 1601, 1602, n. 3; *Collins, id.* at 43. By specifically citing *Weaver*, 450 U.S. 24, with approval, the Court in *Morales* recognized that it has invalidated *ex post facto* modifications of substantive post-sentencing mechanisms which alter the time a prisoner spends in confinement for the crime. *Morales, id.* at 1601.[27] Moreover, this Court has applied the *ex post facto* bar to statutes involving parole, *Marrero,* 417 U.S. 653, and specifically to parole revocation.

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[26] In Ohio, a parole violation is not an independent offense punishable by a sentence prescribed by the Revised Code.

[27] *Accord Morales, id.* at 1602 ("The amendment also left unchanged the substantive formula for securing any reductions to this sentencing range."); *Morales, id.* at 1604 ("The amendment has no effect on the date of any prisoner's initial parole suitability hearing;" and "there is no reason to conclude that the amendment will have any effect on any prisoner's actual term of confinement."); and *Morales, id.* at 1605 ("Such a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings.").

*Greenfield v. Scafati*, 277 F.Supp. 644 (Mass. 1967) (three-judge court), *summarily aff'd*, 390 U.S. 713 (1968) (affirming the finding of an *ex post facto* violation where a statute, which eliminated the opportunity to accumulate gain-time for the first six months after a parole revocation, was applied to an inmate whose initial crime occurred before the statute's enactment). In *Morales*, the Court did not avail itself of the opportunity to jettison either *Marrero, id.*, or *Scafati, id.*, even though these cases were relied upon in Justice Stevens' dissenting opinion. *Morales, id.* at 1607 (Stevens, J., dissenting).

Thus, even if the court's analysis is inconsistent with *Morales* or *Collins*, remand is unwarranted because the result is consistent with those decisions. The new rule possesses features which radically distinguish it from the amendment scrutinized in *Morales*. *See* section I, A, *supra*. These features immediately implicate the *ex post facto* concerns set forth in *Morales* and *Collins*. Accordingly, the outcome would have been the same even if the Sixth Circuit had had the benefit of this Court's decision in *Morales*.

Since both the rationale and the result of the decision below are consistent with *Morales*, there is no justification for granting review or remanding for consideration in light of *Morales*.

## II. PETITIONERS MAY NOT BE PERMITTED TO USE A PETITION FOR WRIT OF CERTIORARI TO REVIVE A DEFENSE OR CLAIM THEY WAIVED BELOW.

Petitioners' argument in support of their second question presented for review is based entirely on a defense which was rejected by the District Court as specious and which Petitioners waived by their failure to cross-appeal. They now seek to revive this

defense before this Court notwithstanding that the issue was not briefed and the Sixth Circuit Court of Appeals had no opportunity to review it.

Petitioners argue that:

> *** the change in the rule does not, in and of itself, have any retrospective effect on the an [*sic*] inmate's initial sentence. Rather, it is the prisoner's subsequent conviction for an offense committed while on parole which occasions the parolee's return to prison.

Petition, 13. This is the same argument rejected as specious by the District Court in its May 27, 1993 Opinion and Order:

> Defendants contend, first, that the procedures followed under OAC §5120:1-1-19(A)(1) do not contravene any constitutional dictates because PVRs, who are already in custody on the new conviction, do not in fact qualify as parolees. Accordingly, defendants argue, no action taken by parole officials can result in the deprivation of the PVRs' liberty, This argument is specious.
>
> The United States Court of Appeals for the Sixth Circuit has specifically recognized that PVRs in Ohio are entitled to a final revocation hearing consistent with Morrissey [v. Brewer, 408 U.S. 471 (1972),] and Gagnon [v. Scarpelli, 411 U.S. 778 (1973)]. Inmates' Councilmatic Voice v. Rogers, *541 F.2d 633 (6th Cir. 1976)*. Moreover, Moody v. Daggett, 429 U.S. 78 (1976), made clear that a parolee's incarceration on an entirely new charge is not co-extensive with the revocation of his parole. Finally, it is indisputable that the actual result of the final parole revocation hearing is the panel's revocation of the PVR's parole.

May 27, 1993 Opinion and Order, 7. Petitioners' argument contradicts both *Moody*, 429 U.S. 78, and *Gagnon*, 411 U.S. at 790 (holding that not only are PVRs entitled to the procedural rights under *Morrissey*, 408 U.S. 471 but they are also entitled to the right to counsel where, "even if the violation is a matter of public record ***, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate,

and that the reasons are complex or otherwise difficult to develop or present."). *Also see Moss v. Patterson*, 555 F.2d 137 (6th Cir.), *cert. denied sub nom. Kette v. Moss*, 434 U.S. 873 (1977).

Petitioners elected not to cross-appeal the District Court's rejection of their sole defense to the merits of Respondents' claims. By doing so, they assumed the risk of an adverse judgment on appeal. Additionally, their failure to appeal deprived the Sixth Circuit of the opportunity to review this issue. Petitioners' waiver of this issue defeats their transparent attempt to revive the issue via the Petition for writ of certiorari.

Petitioners' failure to cross-appeal is particularly fatal to their instant attempt to secure a remand because Petitioners were explicitly aware that a decision was pending in *Morales*, 115 S.Ct. 1597, when they decided not to cross-appeal.[28] This is similar to the situation presented in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). There, the petitioners sought modification of a consent decree because of the Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979). However, *Bell* was pending in this Court at the time the parties executed the consent agreement, just as *Morales* was pending when Petitioners decided not to cross-appeal. Given these facts, this Court stated:

> [P]etitioners were undoubtedly aware that *Bell* was pending when they signed the decree. Thus, the case must be judged on the basis that it was immaterial to petitioners that double celling might be ruled unconstitutional *** .

[28] Respondents brought the matter to their attention in Respondents' "Additional Citation" and during oral argument before the Sixth Circuit.

*Rufo, id.* at 388. Likewise, it must be adjudged that Petitioners' waiver of this issue in the face of an impending decision in *Morales* defeats their instant attempt to secure review or a remand on the basis of *Morales*.

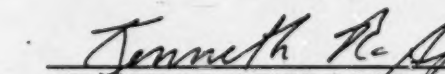
As to the substance of their second question presented for review, Petitioners fail to inform the Court that adoption of Petitioners' argument will require the Court to overrule firmly established precedent, *i.e.*, *Gagnon*, 411 U.S. at 790; *Moody*, 429 U.S. 78; and *Black v. Romano*, 471 U.S. 606 (1985). Petitioners have failed to provide the Court with authority or argument of sufficient weight to warrant review or remand. Most certainly, this Court's decision in *Morales*, 115 S.Ct. 1597, provides no basis for such relief.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request the Court to deny the petition for writ of certiorari because the case presents no issue appropriate for the Court's review, and because the judgment of the United States Court of Appeals for the Sixth Circuit was not in error.

DAVID H. BODIKER #0016590
Ohio Public Defender

THOMAS R. WETTERER, JR. #0020980
Assistant State Public Defender
Counsel of Record



KENNETH R. SPIERT # 0038804
Assistant State Public Defender

Ohio Public Defender Commission
8 East Long Street - 11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394

COUNSEL FOR RESPONDENTS

**CERTIFICATE OF SERVICE**

Pursuant to Rule 29.5(b), Rules of the Supreme Court, I hereby certify that a true copy of the foregoing Respondents' Brief in Opposition was forwarded by regular U.S. Mail to Betty Montgomery, Ohio Attorney General, 30 East Broad Street, Columbus, Ohio 43266-0410, on this 30th day of June, 1995. I further certify that all parties required to be served have been served.

THOMAS R. WETTERER, JR. #0020980
Assistant State Public Defender
Counsel of Record

COUNSEL FOR RESPONDENTS

#10070